APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or Naval Forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 34 U. S. C. 855 (c) (1), provided in its material part, (2) that Petitioner:

> "shall be deemed to have been in the active naval service during such period, and they or their beneficiaries shall be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers, warrant officers, nurses, and enlisted men of corresponding grades and length of service of the Regular Navy or Marine Corps: . . ."

34 U. S. C. 417, provides as follows:

> "When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the Secretary of the Navy, be retired from active service with

retired pay." (RS § 1453). As amended June 17, 1948, c. 497, § 1 (b), 62 Stat. 477.

Section 207 of the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951. 65 Stat. 655, 5 U. S. C. 191a, provides in part, as follows:

(a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers, or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 1-55

(Decided December 4, 1957)

JOHN M. KEARNEY

v.

THE UNITED STATES

Mr. Robert T. S. Colby, for the plaintiff. *Mr. Dale Jernberg* was on the brief.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for retired pay as a former officer of the Marine Corps. The Government moves for a summary judgment on the ground that there is no genuine issue as to any material fact and that, as a matter of law, the plaintiff is not entitled to judgment.

The plaintiff enlisted in the Naval Reserve in September 1942. After a prescribed course as an aviation cadet the plaintiff was, on February 18, 1944, commissioned as a second lieutenant in the Marine Corps. He was later promoted to first lieutenant. In June 1945 he was injured, in line of duty, in an airplane accident. He recovered and resumed full flying status. On October 17, 1946, he was honorably released to inactive duty, "not by reason of physical disability."

About September 29, 1948, the plaintiff applied to the United States Air Force for a commission. He had, from the time of his release from the Marine Corps to inactive duty in 1946, maintained his status in the Marine Corps Reserves. On November 7, 1948, he resigned from the Marine Corps and on November 8 entered on active duty as a captain in the United States Air Force. In connection with his application to the Air Force, he was given a medical examination in October 1948, which disclosed no physical defects.

On November 22, 1948, plaintiff was examined by a flight surgeon and another medical officer, who determined that he was physically qualified for flying duty, and required no corrective measures or other action. Plaintiff continued on active duty with the Air Force until July, 1950 when he was released to inactive duty. A medical examination at the time of that release found him "qualified for General Duty."

Effective January 18, 1952, the Veterans' Administration awarded the plaintiff a 70 percent disability rating for

service-incurred disabilities. In 1952 he applied to the Board for Correction of Naval Records for disability retirement from the Marine Corps, based upon his 1945 injuries. The Correction Board seems to have referred the case to a Naval Retiring Review Board which considered the case and reported to the Correction Board, which then found that the plaintiff was not entitled to relief. The Board's decision was approved by the Secretary of the Navy in 1954.

The plaintiff's claim is that in the airplane crash in June 1945, he was incapacitated for active service, with several severe permanent disabilities. He alleges that the Correction Board and the Secretary acted "arbitrarily, capriciously, contrary to the evidence, and without force of law."

The Government has submitted various records which show that the Correction Board's proceedings included a hearing at which the plaintiff was present and was represented by counsel and presented a medical witness. The Board had before it the results of the numerous medical examinations which the plaintiff had undergone both in the Marine Corps and in the Air Force. It found that he had some disability, but that he was, at the time of his release from active duty in the Marine Corps, qualified for military service, and that he had thereafter performed such service in the Air Force.

The Correction Board and the Secretary did not act arbitrarily, capriciously, contrary to law, or without supporting evidence. Indeed, except for the contrary conclusion of the Veterans' Administration, the evidence would seem to have been quite conclusive that the plaintiff was not incapacitated for military service. The Veterans' Administration thought otherwise in 1952. The Correction Board was not under a duty to defer to the conclusion of the Veterans' Administration if the evidence persuaded it to the contrary.

We think the decision of the Correction Board, approved by the Secretary, that the plaintiff was physically qualified

to perform military duties at the time of his release to inactive duty on October 17, 1946, was not arbitrary, capricious or otherwise illegal and should not be disturbed. *Rafael San Milan, Jr.* v. *United States*, No. 182-54, decided July 12, 1957.

The defendant's motion for summary judgment is granted and the plaintiff's petition is dismissed.

It is so ordered.

FAHY, *Circuit Judge*, sitting by designation; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

IN THE UNITED STATES COURT OF CLAIMS

1-55	JOHN M. KEARNEY	v. THE UNITED STATES
161-57	AMERICAN SANITARY RAG COMPANY	
500-57	CATALINA PROPERTIES, INC.	
576-57	FRED LEINER	

Order

These cases come before the Court on motions for rehearings, amendments of judgments or new trials under Rules 53 and 54 of the Rules of this Court, and on consideration thereof,

IT IS ORDERED this eleventh day of February, 1959, that said motions be and the same are overruled as follows:

1-55	John M. Kearney.	Plaintiff's Motion
161-57	American Sanitary Rag Company.	Plaintiff's Motion.
500-57	Catalina Properties, Inc.	Plaintiff's Motion.
576-57	Fred Leiner.	Defendant's Motion.

BY THE COURT

/s/ MARVIN JONES,
Chief Judge.